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When Silence Means Everything: The Application of Proposition 64 to Pending Actions

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Notes

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Silence can be full of meaning.[1]

INTRODUCTION

Prior to November 3, 2004, one of the most expansive unfair competition laws in the country was on the books in California.[2] Unlike most states, where plaintiffs are barred from bringing unfair competition claims unless they have suffered an injury-in-fact (or barred altogether from bringing such an action), in California any individual could bring an action where the defendant had engaged in a broad class of violations known as "unfair business practices."[3] While a fair number of legitimate lawsuits were brought under that iteration of California's Unfair Competition Law ("UCL"),[4] far more time and money were spent on actions brought by plaintiffs who had suffered no cognizable injury. On November 2, 2004, the California electorate voted to end that practice by enacting Proposition 64.[5] Now private plaintiffs must not only prove that they have suffered an injury-in-fact and some form of pecuniary loss, but

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1. J.M. COETZEE, SLOW MAN 225 (2005).

2. Gail Lees, Editorial, *Where's the Relief?*, RECORDER, June 21, 2000; *see* James R. McCall et al., *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 HASTINGS L.J. 797, 812–13 (1995).

3. CAL. BUS. & PROF. CODE § 17204 (Deering 1993) (amended 2004).

4. Richard Holober, Editorial, *An Opposing View: Prop. 64: Protect Consumers and Fight Pollution—No on Prop. 64*, S.F. CHRON., Oct. 26, 2004, at B9.

5. Carolyn Said, *Proposition 64: Citizens' Right to Sue Limited*, S.F. CHRON., Nov. 4, 2004, at C1.

they must also satisfy new procedural requirements in order to bring an action in the first place.[6]

Without question, the intent of the initiative's drafters was clear with respect to who could bring UCL actions in the future.[7] What was not so clear, and in fact what was not addressed at all, was whether the amendments to the UCL contained in Proposition 64 applied to actions pending at the time of its passage. The result was a question left for the courts to answer, and slowly but surely cases began percolating in the trial courts, before appellate panels, and in front of the California Supreme Court.

This Note explores the diverging viewpoints on whether the amendments to the UCL enacted by the passage of Proposition 64 apply to all pending actions, or only to actions brought after Proposition 64's effective date. It also assesses recent California Supreme Court decisions related to that divergence. The goal is to determine whether the

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6. The Findings and Declarations of Purpose of Proposition 64 read as follows:

The people of the State of California find and declare that:

(a) This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices.

(b) These unfair competition laws are being misused by some private attorneys who:

(1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.

(2) File lawsuits where no client has been injured in fact.

(3) File lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant.

(4) File lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.

(c) Frivolous unfair competition lawsuits clog our courts and cost taxpayers. Such lawsuits cost California jobs and economic prosperity, threatening the survival of small businesses and forcing businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits.

(d) It is the intent of California voters in enacting this act to eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief pursuant to Chapter 5 (commencing with Section 17200) of Division 7 of the Business and Professions Code.

(e) It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution.

(f) It is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public.

(g) It is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain their public protection authority and capability under the unfair competition laws.

CAL. SEC'Y OF STATE, TEXT OF PROPOSED LAWS, PROPOSITION 64 § 1 (2004), *available at* http://www.ss.ca.gov/elections/bp_nov04/prop_64_text_of_proposed_law.pdf.

7. *See id.* § 1(d)–(g).

California Supreme Court was correct in concluding that Proposition 64 applies to pending actions. Part I explores the historical framework of California's UCL, the history leading up to the passage of Proposition 64, and the contents and effects of the initiative. Part II details the two cases heard by the California Supreme Court and examines the issues presented before the Court. Part III studies the divergent arguments both in support of and against applying Proposition 64 to pending actions. It also explores a related issue: the California Supreme Court's perspective on whether and under what circumstances plaintiffs may amend their complaints to satisfy the newly-enacted procedural and standing requirements. The Note concludes by finding that, based on the contents of and the circumstances surrounding the passage of Proposition 64, the California Supreme Court correctly concluded that the initiative applies to pending actions.

I. HISTORY AND BACKGROUND OF CALIFORNIA'S UCL

Initially employed as a mechanism to prosecute secondary trade name infringement,[8] unfair competition actions evolved into a boon for plaintiffs' lawyers during the latter part of the twentieth century.[9] While there undoubtedly were a number of legitimate actions successfully prosecuted by private plaintiffs, many more were considerably suspect.[10] As actions were brought for increasingly specious claims, ranging from suits brought against the maker of Pokémon cards alleging they promoted child gambling,[11] to those brought against the makers of certain sugared cereals alleging they should be labeled as "candy breakfasts,"[12] industry groups whose members were suffering the brunt of these claims became increasingly agitated, referring to section 17200 as a "shakedown statute."[13] Numerous legislative proposals to remedy this issue floundered,[14] but finally a group touting itself as "Californians to

8. Wesley J. Howard, Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation*, 30 HASTINGS L.J. 705, 707 (1979); *see infra* note 17.

9. Sheila Muto, *Unfair Competition Law Faces High-Court Scrutiny*, WALL ST. J., Nov. 3, 1999, at CA1.

10. To be fair, a number of actions brought by plaintiffs who would have otherwise lacked standing were meritorious. For example, consumers in 1990 brought suit against Safeway to enjoin it from re-labeling expired meat; environmentalists in 1999 successfully sued Crystal Geyser to reduce harmful levels of contaminants in its bottled water; and non-profit organizations were often successful in bringing suits to protect consumers. Holober, *supra* note 4. As amended, the UCL still permits such actions to be brought by the California Attorney General and local public officials. CAL. BUS. & PROF. CODE § 17203 (Deering 2006).

11. *See* John H. Sullivan, *Call it Gonzo Law: The Unfair Competition Statute Covers Any Claim, if it's Presented with a Straight Face*, CAL. L. BUS., Jan. 10, 2000, at 22, *available at* http://www.cjac.org/legislation/bp17200/gonzo.html.

12. Comm. on Children's Television, Inc. v. Gen. Foods Corp., 673 P.2d 660, 664 n.3 (Cal. 1983).

13. Bernadette Tansey, *Battle Brews Over Consumer Protection in State*, S.F. CHRON., Sep. 28, 2003, at I1.

14. *See, e.g.*, Jeff Chorney, *Schwarzenegger Seems Ready to Deal on 17200 Fix*, RECORDER, Jan. 30,

Stop Shakedown Lawsuits" submitted enough signatures to the California Secretary of State to put a measure, later known as Proposition 64, on the November 2004 ballot.[15]

A. CALIFORNIA'S UNFAIR COMPETITION STATUTE

California's first unfair competition law was passed in 1872 "as a vehicle for businesses to sue competitors that were gaining an unfair market advantage through an illegal or unscrupulous practice."[16] Most actions brought under the law were initiated by companies harmed by name infringement.[17] In the 1930s, the law was revised and recodified as California Civil Code § 3369.[18] Modifications included the creation of a "public right of action, enforceable in equity, to enjoin unfair business competition."[19] Despite this arguably expansive language, California courts continued to limit the application of section 3369 to secondary name infringement actions for another twenty-four years.[20] The statute was amended in 1963,[21] however, and in the 1970s the California Supreme Court adopted the plain meaning of the statute as its interpretation of the law, finally putting an end to the limited and narrow understanding of section 3369.[22] The Court later noted that "the primary purpose of these statutes was to 'extend[ ] to the entire consuming public the protection once afforded only to business competitors.'"[23] Section 3369 was subsequently recodified as California Business & Professions Code §§ 17200–17205 in 1977.[24]

There are three potential bases for a UCL action, and the statute operates disjunctively, requiring the violation of only one of the elements in order to give rise to a cause of action. The first creates a cause of action for any unlawful business act or practice, the second prohibits unfair business acts or practices, and the third proscribes fraudulent

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2004, at 1. The bill discussed was subsequently proposed as AB 2604, but did not make it very far. *See* Jeff Chorney, *17200 Talks Over, Ballot Fight Now Seems Imminent*, RECORDER, Apr. 7, 2004, at 1; *see also infra* notes 32–33 and accompanying text.

15. *Initiative Would Require Clients for Public Suits*, VENTURA COUNTY STAR, Apr. 13, 2004, at 2.

16. Tansey, *supra* note 13.

17. Howard, *supra* note 8, at 707. Specifically, parties unable to obtain relief by other methods could bring an action for secondary name infringement; where a plaintiff's trade name had developed a "positive association" with the goods being sold, they were entitled to injunctive relief when that name was subsequently used by a competitor. *Id.*

18. 1933 Cal. Stat. 2482.

19. Sharon J. Arkin, *The Effective Use of California's Unfair Competition Law to Redress Managed Care Abuses*, 22 WHITTIER L. REV. 467, 468 (2000).

20. *See, e.g.*, Hesse v. Grossman, 313 P.2d 625, 628 (Cal. 1957); Howard, *supra* note 8, at 712.

21. 1963 Cal. Stat. 3184.

22. Barquis v. Merchs. Collection Ass'n of Oakland, 496 P.2d 817, 829 (Cal. 1972).

23. Bank of the W. v. Superior Court, 833 P.2d 545, 551 (Cal. 1992) (quoting *Barquis*, 496 P.2d at 828).

24. McCall et al., *supra* note 2, at 812–13.

business acts and practices.[25] Standing alone, the statute creates a broad enforcement tool designed to protect consumers. It has been used to this effect in a number of cases, primarily in circumstances where the plaintiff has suffered a legitimate injury, or where the attorney general brought suit on behalf of consumers.

Proposition 64 was not designed to address the substantive aspects of the law, but instead the UCL's extraordinarily permissive standing provisions.[26] In a study conducted in 1995, researchers found that of the sixteen states with unfair competition laws, only California did *not* require an actual injury to the plaintiffs.[27] The statute specifically provided that "'any person acting for the interests of itself, its members or the general public'" could bring a claim.[28] UCL plaintiffs thus ranged from business disputants who included a UCL claim with a preexisting cause of action, to individuals whose sole claim of injury was the fact that the defendant was misleading the public.[29] The statute did not require plaintiffs to have suffered any personal harm or to have any stake in the litigation in order bring an action under the UCL.[30] While some beneficial actions were brought by private citizens under the UCL, such permissive standing requirements also resulted in the rise of professional plaintiffs, who oftentimes filed multiple, questionable actions solely for the remunerative gain of a quick settlement.[31]

B. PROPOSITION 64

Despite the potential for abuse, legislative attempts to close this standing loophole stalled repeatedly. One author referred to the UCL as a "legal tar baby" ("everyone who takes a swing at it gets stuck"), citing the numerous failed attempts to legislatively amend the UCL.[32] More than fifteen bills were introduced to reform the UCL in 2003 and 2004; only a few made it out of committee, and none were successful.[33] Interest

25. CAL. BUS. & PROF. CODE §§ 17200–17205 (Deering 1993) (portions amended 2004).

26. *See id.* § 17204.

27. Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 L. REV. COMM. REP. 227, 247–48 (1996), *available at* http://www.clrc.ca.gov/pub/BKST/BKST-Fellmeth.pdf.

28. *Id.* at 276 (quoting CAL. BUS. & PROF. CODE § 17535 (Deering 1993)).

29. Sullivan, *supra* note 11, at 22.

30. *See* People v. Cappuccio, Inc., 251 Cal. Rptr. 657, 662–63 (Ct. App. 1988).

31. David M. Axelrad et al., *California's "Little FTC Act": Benefiting Consumers, or Lawyers?*, LEGAL BACKGROUNDER, Dec. 4, 1998, at 3. One often publicized UCL story was that of the Trevor Law Group, a firm in Beverly Hills that brought hundreds of UCL actions after gleaning information about a defendant's business practices from the Internet. Terry Carter, *Bottom Feeders*, 90 A.B.A. J. 37, 37 (2004). Other UCL plaintiffs included individuals who brought hundreds of suits against businesses that the plaintiff claimed had failed to provide adequate disability access. Jim Welte, *Tiburon Attorney Fights for Practice*, MARIN INDEP. J., Apr. 3, 2005.

32. Thomas Brom, *Full Disclosure*, CAL. LAW., Apr. 2004, at 33.

33. For a discussion of some of the legislative measures and other attempts to reform the UCL, see Tansey, *supra* note 13. One can imagine that the conflicting interests of the general public and

groups representing companies suffering the brunt of these more specious claims finally realized that traditional legislation would not survive the political process in Sacramento, and turned instead to the electorate.

In late 2003, a coalition known as "Californians to Stop Shakedown Lawsuits"[34] placed an initiative on the ballot to curtail abuses of the UCL.[35] The proposition sought to amend the UCL so that private enforcement actions could be brought only by individuals who are "actually injured by, and suffer[ ] financial/property loss because of, an unfair business practice."[36] Claimants would also have to comply with certain procedural requirements when bringing class action suits, and the power to bring actions on behalf of the general public would be limited to the Attorney General.[37]

In the run-up to the 2004 election, business groups supporting Proposition 64 were pitted against consumer advocacy groups doing their best to force a compromise.[38] Governor Schwarzenegger lent his support to Proposition 64, stating in a press release that the unreformed UCL "turns lawyers into bounty hunters" and that passage of the initiative would aid in making California more business friendly.[39] Supporters of the initiative, including Microsoft, State Farm Insurance, and a number of business interest groups, cited attorney abuse of the UCL as another reason to support of the passage of Proposition 64.[40] Opponents of the proposition faced an uphill battle as its supporters raised millions of dollars for their campaign.[41]

Proposition 64 passed with nearly sixty percent of the vote in the November 2004 election.[42] Like all California initiatives that lack an operative date, it went into effect the next day.[43] With respect to who

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wealthy companies (and campaign donors) might have been a partial cause of the stalemate.

34. The coalition included a number of litigation reform and business interest groups, including the Civil Justice Association of California, the California Chamber of Commerce, and the California Motor Car Dealers Association. Brom, *supra* note 32.

35. *Initiative Would Require Clients for Public Suits*, *supra* note 15.

36. CAL. ATT'Y GEN., OFFICIAL TITLE AND SUMMARY OF PROPOSITION 64, http://vote2004.ss.ca.gov/voterguide/propositions/prop64-title.htm (last visited Jan. 4, 2007).

37. *Id.*

38. *See supra* note 14 and accompanying text.

39. James Ramage, *Schwarzenegger Says Help is on Way*, VICTORVILLE DAILY NEWS, May 5, 2004; Press Release, Governor Schwarzenegger's California Recovery Team, Governor Schwarzenegger Takes Positions on November Ballot Measures Affecting California's Recovery (Sept. 10, 2004) (on file with author).

40. *See* John Wildermuth, *Measure Would Limit Public Interest Suits*, S.F. CHRON., May 31, 2004, at B1; *see also* Lucia Hwang, *The Rise and Fall of the Trevor Law Group*, CAL. LAW., July 2004, at 17, 17; *supra* note 14.

41. Jill Duman, *Cash Pours in for 17200 Fight: Businesses Cough up $7.6 Million*, RECORDER, June 18, 2004, at 1.

42. Said, *supra* note 5.

43. *See* CAL. CONST. art. II, § 10(a).

could bring UCL claims, the amendments resulted in a much more restrictive law:

> [The UCL] has been amended to prohibit any person, other than the state Attorney General or a local public prosecutor, from bringing an unfair competition action unless the plaintiff has suffered injury-in-fact and has lost money or property. The authority of a person to file suit on behalf of the general public absent injury-in-fact and loss of money or property has been abrogated.[44]

Courts were thereafter faced with a quandary. Plaintiffs who had not suffered an injury-in-fact were no longer able to bring a claim under the UCL, but there were a number of UCL actions already pending before courts throughout the state. The text of the initiative was silent with respect to those actions. Thus, while the substantive interpretation of the amended UCL has not been subject to much dispute since the passage of Proposition 64, the issue of how it should be applied has consumed much legal attention.[45]

II. APPLICATION OF PROPOSITION 64 TO PENDING MATTERS

Within days of its passage, members of the bar began disputing whether Proposition 64 would apply to those pending cases,[46] and judges reached a number of different conclusions.[47] For instance, one week after the passage of Proposition 64, a trial court in Sacramento ruled that the initiative lacked language indicating that it applied to pending matters, concluding that it did *not* apply to actions filed before the passage of the initiative.[48] A few days later, a trial court in Los Angeles, applying

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44. United Investors Life Ins. Co. v. Waddell & Reed, Inc., 23 Cal. Rptr. 3d 387, 389 (Ct. App. 2005).

45. It is close to impossible to detect the number of trial court decisions related to this issue. However, a number of courts of appeal weighed in on the matter prior to the California Supreme Court's decisions in the summer of 2006. *See, e.g.*, Bivens v. Gallery Corp., 36 Cal. Rptr. 3d 541, 547–50 (Ct. App. 2005), *review granted*, 130 P.3d 518 (Cal. 2006); Hartford Fire Ins. Co. v. Superior Court, 36 Cal. Rptr. 3d 279, 281–85 (Ct. App. 2005), *review granted*, 129 P.3d 879 (Cal. 2006); Schwartz v. Visa Int'l Serv. Ass'n, 34 Cal. Rptr. 3d 449, 452–58 (Ct. App. 2005), *review granted*, 125 P.3d 290 (Cal. 2005); Consumer Advocacy Group v. Kintetsu Enters. of Am., 28 Cal. Rptr. 3d 775, 797–802 (Ct. App. 2005), *review granted*, 120 P.3d 1051 (Cal. 2005); Cohen v. Health Net of Cal., 29 Cal. Rptr. 3d 46, 56–57 (Ct. App. 2005), *review granted*, 119 P.3d 956 (Cal. 2005); Schulz v. Neovi Data Corp., 28 Cal. Rptr. 3d 46, 49–52 (Ct. App. 2005), *review granted*, 117 P.3d 475 (Cal. 2005); Thornton v. Career Training Servs., 26 Cal. Rptr. 3d 723, 727–31 (Ct. App. 2005), *review granted*, 115 P.3d 1121 (Cal. 2005); Lytwyn v. Fry's Elects., Inc., 25 Cal. Rptr. 3d 791, 811–13 (Ct. App. 2005), *review granted*, 110 P.3d 1218 (Cal. 2005); Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 692–700 (Ct. App. 2005), *review granted*, 110 P.3d 1217 (Cal. 2005).

46. *See, e.g.*, Justin Scheck, *Prop 64 Victory Makes Finding a Plaintiff Crucial*, RECORDER, Nov. 5, 2004, at 1 (quoting both a plaintiff's attorney who stated that the initiative "changes a substantive legal right, and may therefore not be applied retroactively," and a defense attorney who responded that he "plan[s] to argue that Prop 64 changes a procedural right" and intends to argue that it applies retroactively).

47. *See* Bob Egelko, *Court to Decide When Lawsuit Limit Began*, S.F. CHRON., Jan. 5, 2005, at B1.

48. Tentative Statement of Decision, Twomey v. Hansen Info. Techs., No. 03AS03632 (Cal. Sup.

Proposition 64 to a pending case, sustained a demurrer to a UCL claim based on a failure to satisfy the more rigid standing requirements.[49]

In late 2004 and early 2005, courts of appeal began hearing oral argument on this issue.[50] The First Appellate District was one of the first to address the issue head-on in *Californians for Disability Rights v. Mervyn's, LLC*, and it held that Proposition 64 did not apply to actions pending at the time of its passage.[51] Within a month, the Second Appellate District weighed in on the matter in *Branick v. Downey Savings & Loan Association*, holding that Proposition 64 *did* apply to pending matters.[52] Days later, the Fourth Appellate District followed suit with a similar ruling.[53]

The California Supreme Court granted review in *Californians for Disability Rights* and *Branick* soon thereafter, and halted resolution of all other cases until it reached a decision in those matters. In order to properly assess the issues that were presented to the Supreme Court, it is necessary to examine the factual underpinnings of and judicial determinations made in each action.

A. *CALIFORNIANS FOR DISABILITY RIGHTS V. MERVYN'S, LLC*[54]

Plaintiffs in this action filed suit in 2002 against Mervyn's, solely alleging UCL claims based on Mervyn's failure to provide disability access in its department stores.[55] The plaintiffs lost at trial and appealed in early 2004.[56] While that appeal was pending, Proposition 64 was passed and went into effect; Mervyn's moved to dismiss the appeal approximately one month later.[57]

In its opinion, the appellate court acknowledged that "the voters found that the unfair competition laws were being 'misused,' and acted to limit private enforcement actions under the UCL," and that the initiative sought to limit standing by only permitting claims brought by persons who had sustained an injury-in-fact and lost money or property resulting from unfair competition.[58] Despite that finding, the appellate court rejected the contention that the initiative applied to the matter at hand,

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Ct. Sacramento Nov. 10, 2004).

49. Lawrence Gornick et al., *Playing Prop 64 Out: Changes to the Unfair Competition Law Should be Applied Retroactively*, RECORDER, Dec. 1, 2004, at 4.

50. *Id.*

51. 24 Cal. Rptr. 3d 301, 303 (Ct. App. 2005), *rev'd*, 138 P.3d 207 (Cal. 2006).

52. 24 Cal. Rptr. 3d 406, 408 (Ct. App. 2005), *aff'd*, 138 P.3d 214 (Cal. 2006).

53. Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 698 (Ct. App. 2005), *review granted*, 110 P.3d 1217 (Cal. 2005).

54. *Californians for Disability Rights*, 24 Cal. Rptr. 3d at 301.

55. *Id.* at 303.

56. *Id.*

57. *See id.*

58. *Id.* at 304.

concluding that "[r]etroactive application of a statute . . . should not be embarked upon where, as here, there is no indication that retroactivity was ever considered or intended by the voters."[59]

The appellate court predicated its holding on a few different propositions. First, it recognized that "'a new statute is presumed to operate prospectively absent an express declaration of retrospectivity.'"[60] After reviewing the text of the initiative, it then rightly determined that "the only fair conclusion is that the question of whether Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate."[61] The court discussed precedent involving a voter initiative that amended a traditional common law rule (where the amendment did not apply to pending cases),[62] and adopted that conclusion: "'the absence of any express provision directing retroactive application strongly supports prospective operation of the measure.'"[63]

Part of the reason for the court's determination that Proposition 64 did not apply to an action pending at the time of its passage (and it is worth noting that this was and is the only appellate court to have reached such a holding) may be due in part to the fact that counsel for Mervyn's did not frame its position properly. Unlike the UCL defendants before other courts of appeal, Mervyn's simply argued that "a retroactive application of Proposition 64 would further the initiative's intent to stop misuse of the unfair competition law."[64] The court was disinclined to accept such an argument, and the precedent against doing so is unequivocal.[65] With respect to the more appropriate claim that Proposition 64 merely amended a statutory right, and that such rights can be amended at will, however, the court declined to follow decisional law which held that statutory rights were modified retroactively as of the time of the amendment.[66] Another Court of Appeal summarized why the holding in *Californians for Disability Rights* is so troubling:

> That lawsuit involves an appeal by the plaintiff from a judgment for the defendant in an unfair competition law action. If the Court of Appeal reverses the judgment and remands the matter for further proceedings, the trial court will be faced with the prospect of potentially issuing injunctive or restitutionary relief in favor of a party that lacks the jurisdictional basis to maintain the underlying action.[67]

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59. *Id.* at 308–09 (citing Evangelatos v. Superior Court, 753 P.2d 585, 603 (Cal. 1988)).

60. *Id.* at 304 (quoting Tapia v. Superior Court, 807 P.2d 434, 436 (Cal. 1991)).

61. *Id.* at 305.

62. *Evangelatos*, 753 P.2d at 585.

63. *Californians for Disability Rights*, 24 Cal. Rptr. 3d at 305 (quoting *Evangelatos*, 753 P.2d at 598).

64. *Id.* at 305.

65. *See id.* at 306.

66. *Id.*; *see infra* Part III.A.

67. Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 698 (Ct. App. 2005), *review granted*, 110 P.3d

The California Supreme Court properly overturned *Californians for Disability Rights* when it finally decided this issue in the summer of 2006.

B. *Branick v. Downey Savings & Loan Association*[68]

Like *Californians for Disability Rights*, the action in *Branick* had been disposed of at the trial court level and an appeal was pending when Proposition 64 was passed.[69] The plaintiffs' action was premised solely on UCL and false advertising claims related to Downey's alleged improper charging of real estate finance transaction fees.[70] The plaintiffs were not individually harmed by Downey's actions, and alleged that they brought their claims "as a representative action on behalf of the general public."[71]

The Court of Appeal concluded that the trial court erred in dismissing the action (on an unrelated issue regarding federal preemption).[72] Nevertheless, and despite the fact that the briefing had already been completed on the matter when Proposition 64 passed, the Court of Appeal requested supplemental briefing on the matter of "whether the amendments [of Proposition 64] apply to the present case."[73] Unlike the court in *Californians for Disability Rights*, which had issued its opinion on the same day as oral argument in *Branick*,[74] the *Branick* court concluded that the presumption against retroactivity "does not apply when a statutory enactment repeals a statute that provides a purely statutory cause of action."[75] The appellate court went on to determine that the UCL was a statutory rather than common law right, and thus the failure to address the issue of Proposition 64's application should be interpreted as modifying the right immediately.[76] The court of appeal concluded that Proposition 64 applied to the case and that the plaintiffs could not maintain the action unless they had actually suffered an injury-in-fact and lost money or property due to the unfair competition.[77]

Because the court in *Branick* held that the plaintiffs' action could not continue as pled, it also addressed whether the plaintiffs could "amend the complaint to substitute an affected plaintiff to preserve the claims of the represented group."[78] The court concluded that it was the

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1217 (Cal. 2005).

68. 24 Cal. Rptr. 3d 406 (Ct. App. 2005), *aff'd*, 138 P.3d 214 (Cal. 2006).

69. *See id.* at 409, 413.

70. *See id.* at 409.

71. *Id.*

72. *See id.* at 410–11.

73. *Id.* at 413.

74. *Id.* at 414 n.7.

75. *Id.* at 414.

76. *See id.* at 415–16.

77. *Id.* at 417.

78. *Id.*

policy of California courts to permit amendment when the named plaintiffs can no longer maintain their claim, so long as the newly named parties can actually step into the original plaintiffs' shoes without having to present new facts or claims.[79] Finding substitution to be within judicial discretion, the Court of Appeal remanded to the trial court for a determination of whether "the circumstances of this case warrant granting leave to amend."[80] The California Supreme Court subsequently affirmed that decision on all grounds.[81]

C. THE CALIFORNIA SUPREME COURT'S DECISIONS

On July 24, 2006, the California Supreme Court filed its opinions in both *Californians for Disability Rights*[82] and *Branick*,[83] reversing the former and affirming the latter. In *Californians for Disability Rights* the Court, in a unanimous opinion by Justice Werdegar, found that the new law "properly governed the conduct of proceedings following the law's enactment without changing the legal consequences of past conduct."[84] The Court found it most important that defendants be entitled to have their rights assessed under laws governing liability as of the moment of passage, and that this interest far outweighed that of protecting the expectations of plaintiffs in these actions.[85] Following the analyses set forth below, the Court unanimously reversed the Court of Appeal's decision.[86]

In *Branick*, the Court unanimously affirmed the Court of Appeal's finding that Proposition 64 applied to actions pending at the time of passage.[87] The Court adopted its analysis contained in *Californians for Disability Rights*,[88] and further held that the Court of Appeal's analysis with respect to amendment of pleadings was correct.[89] Following the analysis set forth below, the Court agreed that the objectives of Proposition 64 were not met by a ruling that barred the substitution of plaintiffs who satisfied the updated standing requirements.[90] It

79. *See id.*
80. *Id.* at 418.
81. Branick v. Downey Sav. & Loan Ass'n, 138 P.3d 214, 220 (Cal. 2006).
82. Californians for Disability Rights v. Mervyn's, LLC, 138 P.3d 207 (Cal. 2006).
83. *Branick*, 138 P.3d at 214.
84. *Californians for Disability Rights*, 138 P.3d at 212.
85. *See id.* at 213 & n.5.
86. *Id.* at 213.
87. *See Branick*, 138 P.3d at 216, 220.
88. *Id.* at 216.
89. *Id.* at 216–18.
90. *Id.* at 218 ("[T]o bar a meritorious action prosecuted by a substituted plaintiff 'who *has* suffered injury in fact and *has* lost money or property as a result of' unfair competition or false advertising serves none of the voters' articulated objectives." (quoting CAL. BUS. & PROF. CODE §§ 17204, 17535 (Deering 2006))).

accordingly remanded that decision to the trial court.[91]

III. UNDERLYING ISSUES TO BE ASSESSED IN DETERMINING WHETHER PROPOSITION 64 APPLIES TO PENDING ACTIONS

There are three primary points of dispute as to whether Proposition 64 applies to pending matters. The first involves whether the UCL is a statutory or constitutional right, which determines whether, in the face of Proposition 64's silence, the amendments apply to pending actions. The second involves whether the rights modified by Proposition 64 are procedural or substantive; if procedural, they apply retroactively; if substantive, they do not. Finally, there is the debate surrounding the intent of the silent voters; some argue that the text of the amendment implies that the voters intended for Proposition 64 to apply to pending actions,[92] while others assert that the statute's silence shows it does not.

There is in fact some difference in meaning when discussing whether the amendments contained in Proposition 64 apply *retroactively* or to *pending actions*. The true issue here is neither one of retroactivity nor prospectivity. Instead, the issue is whether Proposition 64 applies to pending actions. Thus, the amendment would not be said to apply retroactively, but instead to terminate *pending actions* that do not meet the standing or procedural requirements established by Proposition 64.[93]

A. STATUTORY RIGHTS VERSUS CONSTITUTIONAL RIGHTS

Typically, courts will construe statutes to operate prospectively.[94] Proponents of the position that Proposition 64 does not apply to pending actions argue that this presumption of prospectivity is the only analysis needed.[95] In fact, the analysis depends on whether the right modified by the amendment in question is statutory or constitutional in nature. Where an action is based only on a statute, under which no constitutional rights have vested, "'a repeal of such a statute without a saving clause will terminate all pending actions based thereon.'"[96]

This is so for a number of reasons, including the fact that the California Government Code explicitly states that parties who proceed to litigate under a statutory right do so with full knowledge that the right

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91. *Id.*

92. Shannon Z. Petersen, *California Proposition 64 Requires that Pending Actions Based on the Unfair Competition or False Advertising Laws Be Dismissed*, 10 STAN. J.L. BUS. & FIN. 73, 80 (2005).

93. For this reason, this Note refers to the amendment as applying to pending actions, though many courts refer to the amendment as applying retroactively.

94. Governing Bd. of Rialto Unified Sch. Dist. v. Mann, 558 P.2d 1, 6 (Cal. 1977).

95. *See, e.g.*, Californians for Disability Rights v. Mervyn's, LLC, 24 Cal. Rptr. 3d 301, 306 (Ct. App. 2005), *rev'd*, 138 P.3d 207 (Cal. 2006).

96. *Mann*, 558 P.2d at 2 (quoting S. Serv. Co. v. Los Angeles, 97 P.2d 963, 970 (Cal. 1940)); *see also* Zipperer v. County of Santa Clara, 35 Cal. Rptr. 3d 487, 493–94 (Ct. App. 2005).

could become impaired or be eradicated by statutory repeal.[97] Courts have applied this maxim to pre-judgment proceedings in a variety of contexts.[98] At the same time, the traditional interpretation that silence implies only prospectivity has been applied to modifications of constitutional and common law rights.[99] One of the leading cases on this matter in California, *Evangelatos v. Superior Court*, similarly involved a ballot initiative that was silent with respect to its application, but the ballot initiative in question modified the traditional *common law* doctrine of joint and several liability.[100]

The California Supreme Court's analysis in its decision in *Wilcox v. Same* is largely analogous to the modifications to the UCL effectuated by the passage of Proposition 64.[101] *Wilcox* concerned the repeal of a provision of the state constitution that granted plaintiffs a statutory right to sue under a non-common law theory of contract law.[102] The repeal in *Wilcox* was passed prior to the entry of final judgment,[103] and the Court held that the "privilege of bringing suit . . . was withdrawn by the repeal of the law granting it, and all pending litigation not prosecuted to final judgment fell for want of authority to maintain it."[104] The Court's conclusion largely rested on the fact that the plaintiffs who had brought suit prior to the amendment were acting pursuant to authority that the legislature could take away at any time.[105]

More recent California cases have reached similar conclusions with respect to the repeal of statutory, non-vested rights. In one action where a defendant filed an anti-SLAPP motion after the passage of amendments to that statute, the court held that the motion could not proceed under the prior legislation, in part because it accorded the proper distinction between the repeal of a statutory right/remedy and the retrospective/prospective application of a statute.[106] With respect to statutory claims, the court further held that, "the reviewing court must dispose of the case under the law in force when its decision is rendered."[107]

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97. CAL. GOV'T CODE § 9606 (Deering 2006).

98. *See, e.g.*, *Mann*, 558 P.2d at 6–7; Weissbuch v. Bd. of Med. Exam'rs, 116 Cal. Rptr. 479, 482–83 (Ct. App. 1974) (holding that where possession of marijuana was delisted as an offense prior to final judgment, the individual charged for violation of such an offense must benefit from that amendment).

99. Evangelatos v. Superior Court, 753 P.2d 585, 586–87 (Cal. 1988).

100. *Id.*

101. Willcox v. Edwards, 123 P. 276, 277 (Cal. 1912).

102. *Id.*

103. *Id.*

104. *Id.* at 279.

105. *Id.*

106. Physicians Comm. for Responsible Med. v. Tyson Foods, Inc., 13 Cal. Rptr. 3d 926, 927–33 (Ct. App. 2004).

107. *Id.* at 930.

Accordingly, in contrast to silence in most legislative circumstances, in this instance silence actually militates *in favor of* applying the amendment to pending actions with respect to the repeal or amendment of the statutory rights. Such a rule makes sense in that statutory rights are derived from the legislature, and accordingly can be repealed by the legislature at any time. Although entities vested with constitutional authority issue such rights, the rights themselves are *not* constitutional. Accordingly, they can be repealed or changed with little difficulty at any time, thereby affecting the rights of parties under those statutes. As a result, statutory rights are automatically assumed to be extinguished by subsequent amending or repealing statutes unless the amendment in question includes language that clearly indicates the legislature intended otherwise.[108]

Whether the rights conferred under the UCL are statutory in nature or codified common law is debatable. In 1933, the California legislature modified a pre-existing statute and granted plaintiffs the right to sue on behalf of the general public without requiring plaintiffs to satisfy traditional standing requirements, such as having suffered an injury-in-fact.[109] Although California has always had permissive standing requirements, this broad power to bring such actions cannot be found within California common law, and it is atypical compared to most other jurisdictions.[110] Thus, any argument that Proposition 64 abridges constitutional or common law rights is wrong. The matter has already been addressed by the courts, and they have concluded that the UCL is not a common law right.

Having determined that Proposition 64 modified a statutory right, it is necessary to look to the amendment itself to determine its application. Proposition 64 contained none of the saving language necessary to preserve litigants' rights to prosecute existing actions under the original UCL. Moreover, it sufficiently altered the standing rights under the UCL such that many actions currently pending could not be brought under the now-effective law.[111] Thus, all pending actions that have not yet reached final judgment must be evaluated under the new law. Because California has codified the rule that all statutory rights are subject to repeal,[112] this result must be correct.

In *Californians for Disability Rights*, the California Court of Appeal failed to distinguish between statutory rights and rights found at common

108. Myers v. Philip Morris Cos., 50 P.3d 751, 758 (Cal. 2002).

109. CAL. CIV. CODE § 3369 (West 1933) (current version at CAL. BUS. & PROF. CODE §§ 17200–17205 (Deering 2006)); *see* Petersen, *supra* note 92, at 77–78; discussion *supra* Part I.A.

110. Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1097 (Cal. 1998); *see also supra* note 27 and accompanying text..

111. *See* discussion *supra* Part I.B.

112. CAL. GOV'T CODE § 9606 (Deering 2006).

law.[113] It instead found "a seeming conflict in canons of statutory interpretation,"[114] even though *Evangelatos* explicitly acknowledged that its holding was limited to constitutional rights.[115] Instead, the *Californians for Disability Rights* court myopically focused on the discussion in *Evangelatos* of the presumption of prospectivity as the controlling principle.[116] By failing to properly distinguish between statutory rights and rights found at common law, the court reached the wrong conclusion and permitted the action to proceed under the pre-existing law although it had not yet reached final judgment.[117] No other California Court of Appeal has reached that conclusion.

Other courts have properly distinguished between statutory and common law rights and concluded that the rights at issue are statutory in nature, and that the presumption in favor of prospectivity accordingly does not apply (and the presumption in favor of retroactivity applies instead).[118] A prospective interpretation of the statute could lead to strange results, permitting parties lacking a jurisdictional basis for recovery to obtain judgments in their favor. The passage of Proposition 64 was designed to curtail just that. As one court assessing the situation described, "the electorate would consider such a circumstance to be an absurd situation."[119]

B. Procedural Rights Versus Substantive Rights

A statute is procedural when it "neither creates a new cause of action nor deprives defendant of any defense on the merits."[120] When changes to statutes are procedural in nature, they are found to apply to pending actions because they do not "change[ ] the legal effects of past events."[121] This is not a retrospective application but in fact a prospective application: "[T]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future . . . . [I]t is a misnomer to designate such statutes as having a retrospective effect."[122]

Rather than change the legal effect of past events, Proposition 64 merely modifies the requirements a plaintiff must satisfy prior to filing an

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113. Californians for Disability Rights v. Mervyn's, LLC, 24 Cal. Rptr. 3d 301, 305 (Ct. App. 2005), *rev'd*, 138 P.3d 207 (Cal. 2006); *see also* Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 697 (Ct. App. 2005), *review granted*, 110 P.3d 1217 (Cal. 2005).

114. *Californians for Disability Rights*, 24 Cal. Rptr. 3d at 306.

115. Evangelatos v. Superior Court, 753 P.2d 585, 586 (Cal. 1988).

116. *Californians for Disability Rights*, 24 Cal. Rptr. 3d at 307.

117. *Id.*

118. *See supra* note 96 and accompanying text.

119. Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 698 (Ct. App. 2005), *review granted*, 110 P.3d 1217 (Cal. 2005).

120. Strauch v. Superior Court, 165 Cal. Rptr. 552, 554 (Ct. App. 1980).

121. Tapia v. Superior Court, 807 P.2d 434, 438 (Cal. 1991).

122. *Id.* at 437.

action under California's UCL. Standing requirements are codified in California's Code of Civil Procedure,[123] and although courts have cautioned that "it is the law's effect, not its form or label, which is important,"[124] in this instance standing is in fact a procedural issue.[125] As addressed above, when a statutory right is repealed, the modification is applied immediately.

Some plaintiffs have contended that Proposition 64 does not modify or repeal an existing statutory right and instead adds substantive requirements to the UCL.[126] Such arguments must fail, however, because it is clear that this is "a subsequently enacted specific statute [that] directly conflicts with an earlier, more general provision,"[127] in which case "it is settled that the subsequent legislation effects a limited repeal of the former statute to the extent that the two are irreconcilable."[128] The amendments to the UCL contained within Proposition 64 alter the standing requirements of the previous UCL, thereby creating a direct conflict and a limited repeal of the former UCL in that respect. Such a limited repeal of a statute applies immediately to all pending actions.[129]

Accordingly, the amendments contained in Proposition 64 are procedural in nature, effecting the repeal of an earlier statute. Applying the procedural modifications enacted by the voters in Proposition 64 to the UCL does not limit or modify the effect of a party's previous conduct (the keystone for determining that an amendment is substantive in nature).[130] Instead, the procedural modifications effectuate a repeal of the previous legislation. When viewed through the procedural/substantive issue framework, the silence in Proposition 64 does not require that it apply retroactively, for procedural rights *cannot* apply retroactively. Instead, the procedural modifications apply *immediately* to all actions pending at the time of the amendment, and thus those unable to satisfy the newly enacted procedural requirements must fail.

C. INTENT OF THE VOTERS

A final argument proffered in support of finding that Proposition 64

123. CAL. CIV. PROC. CODE §§ 367–389.5 (Deering 2006).

124. *Tapia*, 807 P.2d at 438.

125. *See, e.g.*, Anthony v. Snyder, 10 Cal. Rptr. 3d 505, 512 (Ct. App. 2004) (addressing standing as a procedural issue); Holt v. Booth, 2 Cal. Rptr. 2d 727, 731 n.8 (Ct. App. 1991) (finding standing to be procedural, rather than substantive in nature); Kane v. Redevelopment Agency, 224 Cal. Rptr. 922, 923 (Ct. App. 1986) (addressing the procedural issues of standing).

126. Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 695 (Ct. App. 2006), *review granted*, 110 P.3d 1217 (Cal. 2005).

127. Governing Bd. of Rialto Unified Sch. Dist. v. Mann, 558 P.2d 1, 6 (Cal. 1977).

128. *Id.*

129. *Benson*, 24 Cal. Rptr. 3d at 694.

130. Tapia v. Superior Court, 807 P.2d 434, 438 (Cal. 1991).

should apply to pending actions is that the voters intended for the amendments to apply immediately.[131] Courts and commentators alike have not been receptive to this argument, and for good reason. The primary problem with this contention has been addressed throughout this Note: *the initiative, findings, and declarations of purpose are silent with respect to its application to pending matters.* As the appellate court in *Californians for Disability Rights* correctly stated, "When read as a whole, the only fair conclusion is that the question of whether Proposition 64 applies to pending lawsuits was not presented to, nor considered by, the electorate."[132] However, the language of Proposition 64 could be construed to cut against this argument in that it states "an intention to prohibit the '*filing*' of lawsuits by private parties uninjured by the challenged business practice."[133]

Furthermore, because of the strength of the other arguments in support of applying Proposition 64 to pending matters, the intent of the electorate is largely irrelevant. It is arguable that the intent supports applying the amendments to pending matters because the findings and declarations of Proposition 64 describe the problems that amending the UCL are meant to solve, and that "[i]t is the intent of the California voters in enacting this act to eliminate frivolous unfair competition lawsuits."[134] However, too strong an inference is required to conclude that the amendment is intended to apply to pending matters based simply on its language. Some commentators urge that "[t]hese clear statements of intent indicate that the electorate did not want to just stop such lawsuits in the future, but to stop them now, before they can continue to do damage."[135] Regardless, "[t]he only legislative intent relevant . . . would be a determination to save th[e] proceeding from the ordinary effect of repeal."[136] Thus, the electoral intent arguments in support of finding Proposition 64 to apply to pending actions cannot be relied upon to reach such a conclusion.

D. Amending Pleadings to Satisfy Proposition 64

A related issue that arises with respect to applying Proposition 64 to

131. *See, e.g.*, Branick v. Downey Sav. & Loan Ass'n, 24 Cal. Rptr. 3d 406, 413–14 (Ct. App. 2005), *aff'd*, 138 P.3d 214 (Cal. 2006) ("Downey also argues that . . . Proposition 64 applies to this case because the language of the initiative and the amended statute shows that the voters intended the initiative to apply to existing lawsuits."); Californians for Disability Rights v. Mervyn's, LLC, 24 Cal. Rptr. 3d 301, 306 (Ct. App. 2005), *rev'd*, 138 P.3d 207 (Cal. 2006) ("Mervyn's contends that a retroactive application of Proposition 64 would further the initiative's intent to stop misuse of the unfair competition law.").

132. 24 Cal. Rptr. 3d at 305.

133. *Id.* at 304 (emphasis added).

134. Cal. Sec'y of State, *supra* note 6, § 1(d).

135. Petersen, *supra* note 92, at 80.

136. Benson v. Kwikset Corp., 24 Cal. Rptr. 3d 683, 697–98 (Ct. App. 2005), *review granted*, 110 P.3d 1217 (Cal. 2005).

pending matters is whether the plaintiff should be granted leave to amend the complaint in order to substitute in new parties who satisfy the modified standing requirements.[137] The general trend among the courts of appeal prior to the Supreme Court's decision was to grant parties leave to amend.[138] There was some dispute, however, as to how permissive that leave should be.

On the more restrictive side, the Court of Appeal in *Benson v. Kwikset Corporation* held that it was fair to remand the action so that the plaintiff could attempt to amend his complaint and satisfy the requirements of the amended UCL.[139] That court was unwilling, however, to permit the plaintiff to substitute in another party who would satisfy the standing requirements under Proposition 64 where the statute of limitations would bar the filing of a new action.[140] The plaintiff sought leave to substitute in new parties that would satisfy the standing requirements and to have that cause of action satisfy the statute of limitations by "relating back" to the date of the filing of the claim (although the statute of limitations would have otherwise already run, barring the claim).[141] The court held that plaintiffs could not apply the relation back doctrine with respect to substituting new parties in order to overcome the expired statute of limitations.[142] The relation back doctrine only applies where the new claim involves the same injury.[143] The court correctly reasoned that a new plaintiff who has suffered an injury-in-fact would "amount to a substantial change in the action."[144] Unlike substitution cases where the plaintiff merely requests that a representative party assume its causes of action, in this circumstance the plaintiff would have to "allege and prove his or her own injury and loss of money or property to maintain suit."[145] Thus, where the statute of limitations has run, some courts have narrowly concluded that a plaintiff will only be entitled to amend its action so as to satisfy the amended UCL standing requirements, and will not be permitted to substitute in parties whose claims would be barred by the statute of limitations.[146]

Other courts have held that substitution of parties should be permitted even where new facts will be pled to satisfy the standing

137. *See supra* note 78 and accompanying text.

138. *Benson*, 24 Cal. Rptr. 3d at 699; Branick v. Downey Sav. & Loan Ass'n, 24 Cal. Rptr. 3d 406, 417 (Ct. App. 2005), *aff'd*, 138 P.3d 214 (Cal. 2006).

139. 24 Cal. Rptr. 3d at 700.

140. *Id.*

141. *Id.* at 699.

142. *Id.* at 699–700.

143. Norgart v. Upjohn Co., 981 P.2d 79, 96 (Cal. 1999).

144. *Benson*, 24 Cal. Rptr. 3d at 699.

145. *Id.* at 700.

146. *Id.*

requirements of the amended UCL.[147] The appellate court in *Branick* took a more expansive view and held that, "so long as the amendment does not present an entirely new set of facts and the defendant is not prejudiced," amendment was permissible.[148] Although that court left it to the trial court to determine whether granting the plaintiff leave to amend would be appropriate, it nevertheless is clear that the *Branick* court took a far more expansive view than the *Benson* court with respect to amending pleadings to satisfy the amended UCL.

The California Supreme Court concurred with the broader view of the *Branick* court in its opinion, finding it appropriate to allow a party to amend its pleadings if the statutory requirements are satisfied.[149] The Court concluded that the purpose of Proposition 64 is satisfied by applying the initiative to pending actions, and that to permit parties to amend their complaint does not hinder that purpose.[150] As discussed, such a conclusion is fully in line with the applicable case law, and the Court reached the right conclusion by permitting parties to amend where the statutory requirements have been satisfied.

CONCLUSION

Undoubtedly the electorate, in enacting Proposition 64, sought to curb the abuse of California's UCL by limiting the previously expansive standing requirements to injuries-in-fact and by creating new procedural safeguards to limit those actions. Despite this desire, it cannot be inferred from the text of the initiative alone that the voters intended for the proposition to apply to pending actions. As the California Supreme Court discussed in *Californians for Disability Rights*, arguments supporting such an application of intent must fail.[151]

While the intent argument is weak, much remains to support the conclusion that Proposition 64, by its own design, must apply to pending actions and that those actions that do not conform to its requirements must be dismissed. The strongest of these arguments is that Proposition 64 modifies a pre-existing statutory right. Citizens are on notice that such statutory rights are subject to repeal at any time, and the repeal of such statutory rights is effective immediately. It has been beyond dispute for more than fifty years in California that the UCL is not an embodiment of the common law, and thus it is a statutory right subject to this proviso. Its

147. *See, e.g.*, Branick v. Downey Sav. & Loan Ass'n, 24 Cal. Rptr. 3d 406, 417–18 (Ct. App. 2005), *aff'd*, 138 P.3d 214 (Cal. 2006).

148. *Id.* at 417.

149. *Branick*, 138 P.3d 214, 217–18.

150. *Id.* at 217.

151. Californians for Disability Rights v. Mervyn's, LLC, 24 Cal. Rptr. 3d 301, 305 (Ct. App. 2005), *rev'd*, 138 P.3d 207 (Cal. 2006).

modification (which can be interpreted as a repeal due to the reduced standing requirements) applied to pending actions the moment it became effective.

Another, slightly weaker argument in support of finding that Proposition 64 applies to pending actions is the fact that the initiative affected a procedural rather than a substantive right. Standing requirements have long been characterized as procedural, and that is likely the case herein as well. Procedural modifications are effective immediately, thus further buttressing the conclusion that Proposition 64, by its own design, applies to pending actions.

Finally, with respect to whether plaintiffs should be entitled to amend their pleadings or even substitute new plaintiffs, the California Supreme Court's narrow holding in this respect was appropriate. To allow plaintiffs to subvert California's longstanding relation back principle to overcome statute of limitations problems would put defendants in an untenable position, leaving them burdened with having to defend actions on new facts and injuries that would be barred by the statute of limitations if filed today. If a plaintiff's claim is within the statute of limitations, it should be permitted to substitute new parties as necessary so long as the facts remain somewhat similar. In the event that the statute of limitations has run, however, courts should limit granting leave to amend to those situations where the plaintiff remains in the case but somehow manages to satisfy the standing requirements set forth in Proposition 64.

The dispute in determining whether Proposition 64 applies to pending actions thus does not boil down to the failure of its drafters to specify when it applies. In fact, Proposition 64's silence, standing alone, cuts against finding that it should apply to pending matters. Rather than interpreting this silence, courts must instead look to the design of the initiative and the law it amends in order to determine whether it applies to pending actions. In this instance, such an examination reveals that despite the silence on its face, Proposition 64 has plenty to say on the matter.